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IN THE COURT OF QUEEN'S BENCH.

Warrener et. al. vs. Kingsmill.

CHIEF JUSTICE ROBINSON'S JUDGMENT.

The 8th plea is, in my opinion, a good defence in substance, and is so far sufficient in form that it is not bad for any of the causes assigned. Nothing can be conceived more unjust or unreasonable than that a sheriff, acting within his district in this Province, and seizing the goods of a defendant in obedience to process of this court, which he was bound to obey, should be subjected to be proceeded against in a foreign country as a trespasser for such act of duty legally performed by him, and shall be compelled to abide by the laws of a foreign court, and not by the laws of the country in which he was legally authorized and compelled to do the act complained of.

We may admit that for a trespass to goods committed abroad, an action may be sustained in this Province if the defendant shall be found within our jurisdiction, and we may assume that in like manner the courts of a foreign country may, under similar circumstances, take cognizance of an action of trespass to personal property committed here. But in either case, the question whether the act complained of was a trespass or not, must be governed by the law of the country where the fact took place, and if a foreign court, acting in disregard of such law, should adjudge that to be illegal which was done here in obedience to our law, however a judgment so rendered might be treated as conclusive in the foreign country, yet we could never allow it to be conclusive here ; but in an action on the judgment we must of necessity, for the due protection of our own subjects, hold the grounds of it to be to this extent examinable, that when we see the judgment to have been founded upon a cause of action arising in and wholly confined to our own jurisdiction, we must give the defendant, in an action on that judgment, the benefit of that law which is alone applicable to that transaction.

We have many statutes which allow parties in the promotion of public objects to do various acts affecting the persons and property of others, which but for such legislative authority would be acts of trespass. They could never venture to avail themselves of the

powers and privileges conferred upon them, nor could justices of the peace, sheriffs, and other officers execute their duties with any confidence, if they were liable upon setting their foot within a neighboring foreign country to be prosecuted for such acts as if committed there, and if upon a trial before a foreign tribunal they could not be certain of being judged by the same law which governed their conduct here.

In Phillips v. Hunter, 2 H. B. 410, C. J. Eyre says, "there is one way only that the judgment of a court in a foreign state is examinable in our courts, and that is when the party who claims the benefit of it applies to our courts to confirm it."

His Lordship, in what he adds further on this point, seems to have entertained the opinion that in general, where a plaintiff was suing upon a foreign judgment in England the court in England could examine and receive evidence of what the law in the foreign state was, and whether the judgment is warranted by that law.

I apprehend he lays down that principle more broadly than would be done at the present day in England; but surely it can admit of no doubt that when an inhabitant of this country is sued abroad for a cause of action arising here, and when the plaintiff having obtained a judgment against him contrary to our law seeks to enforce it here, he is not to receive the aid of our law in enforcing such a judgment. Whenever anything can be shown to us to warrant the idea that a sheriff of an English county is not only liable to have an action brought against him in Paris or St. Petersburgh for a false return to a writ of *fi. fa.* but that he must abide by the law of that country finally, and that in any action brought in England on a judgment obtained against him in such case abroad, he must submit to have it enforced, although according to the laws of England his act was legal, then I should be prepared to hold that the defendant's plea is no defence.

At present, it seems to me that the idea of bringing such an action is so contrary to justice, that if the facts had been placed before us in the first stage of the cause on affidavit, and had appeared after hearing both sides to be as represented, we ought not to have hesitated to stay proceedings in the suit, and should not have left the sheriff to the expense and risk of being entangled in special pleadings. The attempt to withdraw the matter from its proper jurisdiction is unjustifiable, and has been hitherto, as I believe, wholly without precedent.

I speak of course with reference to the kind of action which this is, as appears from the facts set out in some of these pleas—namely, the drawing to a foreign jurisdiction—the determination of the question, whether a sheriff of this province has executed legal process here according to our laws. I do not think it necessary for the defendant to set out in his plea the proceedings and pleadings in the foreign action, nor to state that he objected to the jurisdiction.

The principles which apply to foreign judgments and to the judgments of our own inferior courts, are in general the same; and in neither case, can a judgment, given in a matter over which the tribunal has no jurisdiction, be enforced in this court on the ground that the jurisdiction was not excepted to in the original cause

I consider, therefore, that the 8th plea sets up a sufficient justification.

NOTE.—In this same case while the demurrer was under the consideration of the court, an application was also pending for a rule on the plaintiffs to shew cause why all proceeding should not be stayed in this cause generally or against the defendant Kingsmill, with such directions as to costs as to this court may seem fit.

The Chief Justice, before the judgment had been given on the demurrer, in disposing of the application, made the following remarks:—

"I cannot contemplate without some apprehension, the inconveniences which may follow if every act which has been done in this province under legal process, civil or criminal, may be made the occasion of harrassing the public officers of this province or suitors in our courts with actions treating as trespasses acts sanctioned and compelled by legal authority, and if such officers or suitors must be held afterwards exposed to the same consequences of judgments rendered against them in foreign courts on such causes of action as on those which by our laws, and the laws of most countries, are considered to be equally examinable in all countries where the debtor may happen to be found.

It is said in Viner's Abr. (law B.) "There is no law or precedent obligatory on the sovereign court of one country to put in execution the sentence of any court in another country, for *par in parem non habet imperium.* And such proceedings in another country shall not be called *res judicata*, nor prevent a new inquiry against a person and his goods, under the direction and protection of the laws of the country." He cites for this a case of Goddart v. Swinton, decided in 1715.

It appears to me, that we should be safe in holding that when sufficient is shewn on the record to make it certain that the foreign judgment was not on a matter arising within the jurisdiction of the court which gave it, nor in a matter properly cognizable by their laws, nor to be determined by them, but only proper to be adjudged in our own courts, the defendant in a suit on that judgment should be held as free to deny his liability as if the matter had not been drawn away from the proper jurisdiction.

In the state of New York, where this judgment has been rendered, it is a fundamental principle of their code of jurisprudence, that "every action against a public officer or person specially

appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command, or in his aid, does anything touching the duties of such officer, the action must be brought in the country where the cause or some part thereof arose.—Code of Civil Procedure, 252.

The venue is thus made strictly local on a cause of action such as formed the foundation of this foreign judgment. The sheriff of one county could not be made to answer in the court of an adjoining county of the same state. The plaintiffs in the action assume a principle which would render all persons who under the provisions of our own statutes have powers given to them, or duties exacted of them, and protection afforded to them in order to give them confidence in discharging those duties—would render, as I consider, all such persons equally liable to have the legality of their conduct in the course even of their judicial duties examined and adjudged upon by the courts and laws of other countries where our statutes and laws may be disregarded—their obligation disclaimed, or their provisions misapplied.

It is due, I think, to the protection of our fellow subjects and the proper independence of our courts, that they should not apply their authority in aid of foreign tribunals, by enforcing judgments in such matters so obtained. And I have a strong impression that there is a claim upon us, when the circumstances are brought out on the one side, and not denied or disproved on the other, to take care that parties shall not be prejudiced in this country by anything that may have been done abroad in such cases, but shall be at liberty to defend themselves, unembarrassed as much as possible by anything of that kind.—See 11 M. & W. 894; 2 Smith's Lea. Ca. note 448.

IN THE COURT OF APPEAL.

WARRENER *vs.* KINGSMILL, ET AL.

CHANCELLOR BLAKE'S JUDGMENT.

The only questions argued upon this appeal were raised under the general demurrer to the 8th plea.

The Declaration is an assumpsit upon a judgment recovered in the Court of Common Pleas for the County of Erie in the State of New York; and the only allusion in the declaration to the cause of action upon which that recovery was had, is, that it was for certain trespasses committed by the defendant against the plaintiff.

The defendant is the Sheriff of the Niagara District; and the trespasses complained of consisted in the seizure by him, as Sheriff,

within his County, and under a Writ duly issued, of certain timber said to have been the property of the plaintiff.

It is clear, I apprehend, that the foreign Court, in determining the question of trespass, in that action, should have been guided by the law of the Country. It follows, consequently, that a plea alleging that the property in question, according to the law of the country, was liable to seizure by the defendant, under the Writ upon which he proceeded; that all his proceedings in relation to such seizure were in accordance with the law of Canada, but that the foreign Court had refused to give effect to those facts, although proved upon the ground that the defendant's position and duty as Sheriff, according to the laws of Canada, did not constitute a justification as against the plaintiffs, who not being British subjects nor domiciled in Canada, were not affected by the law of Canada;—it follows, I say, and is not I believe denied, that such a plea would present, in substance, a valid defence.

Now, it appears to me that the 8th plea does in fact present that defence. It states that the trespass upon which the judgment was founded, consisted in taking and carrying away certain timber alleged to have belonged to the plaintiffs; that at the time of such taking the defendant was Sheriff of the District of Niagara, and that Davis having previously sued out a Writ of Attachment against one Tanner, as an absconding debtor, had placed the same in the defendant's hands, as such Sheriff, for execution; that while the said writ was in full force, the defendant as such Sheriff, duly seized the timber in qestion, *then being the timber of Tanner*, in virtue thereof; "*that at the time of such attaching and seizing the said timber was by the laws of Canada the property of the said Tanner and subject to said attachment;*" that the alleged trespass consisted in the seizure in question; that at the time of such seizure the defendant was and since continually has been resident and domiciled in Canada and not within the jurisdiction of the foreign court, or subject to the foreign law; that "*by and according to the law of Canada, where the said causes of action and every part of them arose for which the judgment was recovered, the said taking and carrying away did not nor does not give the plaintiff any cause of action against the defendant, nor was he liable by the laws to be prosecuted therefor;*" that the Court of Common Pleas, wrongfully, corruptly, and contrary to natural right and justice, although those facts were proved as a defence for the defendant, refused to admit such fact or any of them as a defence to the defendant, and declared and adjudged that the defendant could not defend or justify himself thereby, or by his position or duty as Sheriff, under the attachment, and that the claim of the plaintiff could not be affected by such attachment or by the facts stated in the plea, the plaintiffs not being British subjects nor domiciled in Canada, and not affected by the laws of Canada, although it was proved at the trial that Tanner and his property were subject to the said attachment; and that the

timber was within the Sheriff's bailiwick, and was levied thereon according to the laws of Canada.

It is not denied, I apprehend, that this plea, if confined to the allegations I have stated, would have been sufficient in substance; —must have been upheld upon the general demurrer. Such I understand to be the opinion of a great majority of my learned brothers. But it is said that the plea contains a further statement, not yet noticed, which is, in effect, an admission by the defendant of the plaintiff's property in the timber, upon which he is entitled to recover; and it is this allegation, I believe, which has given rise to the principal difficulty in the construction of the plea The passage alluded to follows the statement of the timber "then being the property of Tanner" and is in these words—"and the defendant further says that the said plaintiffs at the time of the said attaching claimed and pretended to own the said timber by virtue of a sale thereof made to them, the plaintiffs, by the said Tanner, after the issuing of the aforesaid warrant of attachment and the delivery thereof to the defendant, and while the said timber was in the said District of Niagara;" then follows the allegation before stated—"Whereas the said defendant avers that at the time of the said attaching and seizing the said timber was by the laws of Canada the property of Henry Tanner, and subject to such attachment."

It is said that the passage just above cited contains a conclusive admission of a sale by Tanner to the plaintiffs; that is of property in the plaintiffs; that is of their right to recover in the action; and numerous well-known decisions upon the effect of such allegations or pleas giving express color in actions of trespass are referred to as in point.

Upon all questions, but especially upon one of this character, arising in a Court of Law, I differ from my learned brothers, whose daily considerations of such matters render them so much more competent to form a correct opinion upon such subjects with the utmost diffidence. But the parties have a right to my judgment, such as it is, and the best opinion I have been able to form is, that the allegation in question has not the effect of invalidating this plea.

It does not appear to me that pleas giving express color in actions of trespass are at all analogous to the present case. A certain class of pleas by way of confession and avoidance, would, in strict reason, have been bad as negativing altogether the plaintiff's allegations of title, and, therefore, only pleadable in strictures by way of traverse. Pleas objectionable on this ground, however, were, under some circumstances, found to be convenient; and this gave rise to a fiction, known as express color, invented for the purpose of giving validity, in point of form, to a class of pleas, which, irrespective of such fiction, would have been pronounced bad, as repugnant to the very principle upon which pleas in confession and avoidance are constructed. It consists in an unconnected statement, *introduced into the plea for the sole purpose of admitting*

a colorable title in the plaintiff. It is not traversable; because, being mere fiction, to permit the plaintiff to traverse it would be, in effect, to abrogate the rule; but it is a statement absolutely necessary to the validity of the plea; and where instead of stating a colorable, it admits a perfect title to the plaintiff, it is, of necessity, fatal to the plea.

It is perfectly obvious, I think, that decisions in relation to such pleas can afford no safe analogy for our guidance in the present case. The admission of title in such cases is an isolated statement, unaffected in construction by the residue of the plea, because wholly unconnected in meaning; and which construed alone, can afford no room for the argument that the plea is not to be construed as admitting such title in the plaintiff as is alleged, because the statement is introduced with no other object than to make such admission;—without some such admission the plea would be bad. From the very form of such pleas, therefore, this must be construed as admitting in the plaintiff such title as is alleged. The validity of that title, therefore, is the only question, and, in that respect, the statement is neither restricted nor enlarged by the other allegations in the plea.

But express color was not necessary to the validity of the plea in this case. It admits the judgment upon which the plaintiff counts, and avoids it by alleging that a good defence had been proved, according to the law of Canada, by which only the question could have been legally determined, but that the foreign tribunal had refused to give effect to that defence, upon the ground that the plaintiffs were not subject to the law of Canada, and could not be affected thereby: Had this been an action of trespass, and had the defendant, for the purpose of giving color, and to render his plea correct in form, stated that the plaintiffs claimed the goods under a sale from the owner.—that is, had he admitted a perfect and not a colorable title,—such statement, I presume, would have been fatal to the plea. But express color would have been quite unmeaning in the plea; and the allegation in question cannot be reasonably intended, I think, to have been introduced for any such purpose. In order, therefore, to determine whether the allegation referred to is to be construed as *admitting* a sale to have taken place; or as stating that the plaintiffs *claimed and pretended* it to have taken place;—whether it is to be construed as the admission of a fact, or as the statement of a pretence, we must look at the whole plea. Now not only is this allegation preceded by the statement that the defendant seized the timber, "then being the timber of Tanner," but it is also an averment of property in him, in a form which seems to me to remove all doubt. The whole passage runs thus—"And the defendant further says that the said plaintiffs at the time of the said attaching claimed and pretended to own the said timber by virtue of a sale thereof made to them the said plaintiffs by the said Tanner. . . . . Whereas the said defendant avers that at the time of the said attaching and seizing the said timber was by

the law of Canada the property of Henry Tanner, and subject to such attachment,"

Now the expression "whereas the defendant avers" imports undoubtedly that something is to follow contrary to the preceding allegation. But the pleader certainly did not mean to deny that the plaintiffs claimed and pretended to own under a sale from Tanner. The action and recovery had placed that beyond doubt. What is it then that he did mean to negative? Obviously the fact of sale, at least of an effective sale. It must be borne in mind that this question comes before us on general demurrer.

Again the plea avers that according to the law of Canada "the said taking and carrying did not nor does give to the plaintiff any cause or right of action against him, and he was not by the said laws liable to be prosecuted therefor." And the plea concludes with an allegation that it had been proved at the trial that "the timber had been levied on according to the laws of Canada."

Then if the passage in question will admit of either construction; and if the allegations to which I have referred shew conclusively that the defendant cannot have intended to admit a sale, it will be our duty, I apprehend, to uphold this plea.

It is said, however, that the plea does not allege that the plaintiffs pretended to own under a sale from Tanner, generally, but under a sale from Tanner "after the issuing of the aforesaid warrant of attachment and the delivery thereof to the defendant, and while the same was in force, and while the said timber was in the said District of Niagara," and it is contended that the subsequent allegation of property in Tanner must be understood, not as asserting a general right of property in him, but only property as against a sale under the special circumstances stated in the plea. This constitutes, as it seems to me the only real difficulty in the construction of this plea. Such may have been, no doubt, the proving intention of the pleader. But I find in the plea a general unqualified averment that the property at the time of the seizure was the property of Tanner; and that such seizure was legal according to the law of Canada. And it is averred that these facts had been proved, and that the foreign tribunal had refused to give them effect, not for any default in proof, but on account of the inapplicability of the law of this country, by which the liability of the defendant ought to have been determined. Now, in my humble opinion, the statement referred to cannot control these general unqualified allegations; they must prevail against a mere inference, which would have the effect of invalidating the plea upon general demurrer.